UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

HATIM NAJI FARIZ
_____/

MOTION TO QUASH EXTORTION ALLEGATIONS IN COUNTS 35-38 AND 40-44, MOTION TO DISMISS COUNTS ONE, 35-38, AND 40-44 OR ALTERNATIVELY FOR REVIEW OF GRAND JURY TRANSCRIPTS AS IT RELATES TO EXTORTION, AND MEMORANDUM OF LAW IN SUPPORT

Defendant, Hatim Naji Fariz, by and through undersigned counsel, and pursuant to Federal Rules of Criminal Procedure 6(e)(3)(E)(i), 6(e)(3)(E)(ii), and 12, hereby respectfully requests that this Honorable Court (1) quash the extortion allegations contained in Counts 35-38 and 40-44 of the Indictment, and (2) dismiss Counts One, 35-38 and 40-44, or alternatively order the disclosure of the grand jury transcripts as it relates to the extortion allegations. As grounds in support, Mr. Fariz states:

On October 3, 2003, Mr. Fariz filed his motion to quash paragraph 26(b) of the Indictment for failure to state a legal basis for relief. (Doc. 302). On March 12, 2004, this Court agreed with Mr. Fariz's argument that the Indictment fails to sufficiently allege a legal and factual basis to support extortion as a racketeering activity. (Doc. 479 at 56-60). Specifically, based on the Supreme Court's decision in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court determined that "extortion" as a

racketeering activity means actions in which defendants obtain or attempt to obtain property or thing of value. The Court indicated that the Court's review of the Indictment revealed only one paragraph (Paragraph 29) in which there is even an attempt to allege that the Palestinian Islamic Jihad obtained or attempted to obtain property, and that Paragraph 29 never alleges that any of the current owners of the property or thing of value would lose title to that property. The Court therefore determined that this allegation was insufficient to allege that something of value was sought to be extorted. Accordingly, the Court granted Mr. Fariz's motion to quash 26(b) from the Indictment.

Counts Five through Forty-Four allege that the Defendants, in violation of the Travel Act, 18 U.S.C. §§ 1952(a)(2) and (a)(3):

> did knowingly and willfully use a facility as described below in interstate and foreign commerce with the intent to (a) commit any crime of violence to further any unlawful activity, that is, *extortion* and money laundering, in violation of the laws of the State of Florida and the United States, and, (b) otherwise promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity, namely, *extortion* and money laundering, and thereafter did promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity.

(Doc. 1 at 100) (emphasis added). The Defendants are charged in multiple counts based on certain alleged facsimile or telephone conversations referenced in specified Overt Acts contained in Count One. Mr. Fariz is charged in Counts 35-38 and 40-44, based on Overt Acts 236, 238, 240, 242, 244, 247, 251, 253, and 255.

The Travel Act, in relevant part, provides that:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with the intent to –
>
> . . . .
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform [an act described above shall be fined, imprisoned, or both].

18 U.S.C. § 1952(a). For the purposes of this statute, "unlawful activity" includes, among other acts, "extortion . . . in violation of the laws of the State in which committed or of the United States." 18 U.S.C. § 1952(b).

The Supreme Court has examined what "extortion" means in the context of the Travel Act. With respect to extortion in violation of State law, the Supreme Court has concluded that "if an act prohibited under state law fell within a generic definition of extortion, for which we relied on the Model Penal Code's definition of 'obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats,' it would constitute a violation of the Travel Act's prohibition regardless of the State's label for that unlawful act." *Scheidler*, 537 U.S. at 410 (citing *United States v. Nardello*, 393 U.S. 286, 296 (1969)). Thus, as with the RICO statute considered in *Scheidler*, the meaning of extortion under State law referenced in the Travel Act is also understood generically to mean obtaining or attempting to obtain property or something of value. *See id.* ("Because petitioners did not obtain or attempt to obtain respondents' property, both the state extortion

claims and the claim of attempting or conspiring to commit state extortion were fatally flawed. The 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion."); *Nardello*, 393 U.S. at 295-96 (finding that the defendants "attempted to obtain money from their victims by threats" and that "the acts for which [the defendants] have been indicted fall within the generic term extortion as used in the Travel Act," despite that the Pennsylvania law labeled "extortion" only applied to public officials).

The Travel Act also references extortion in violation of the laws of the United States. The Hobbs Act, 18 U.S.C. § 1951, expressly prohibits extortion, defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). In *Scheidler*, the Supreme Court held that under the Hobbs Act "a person must 'obtain' property from another party to commit extortion." 537 U.S. at 404. Thus, extortion in the context of the Travel Act, whether referenced to state or federal law, requires that a person obtain or attempt to obtain property from another party.

As with the Indictment's allegations in Count One, the Indictment's allegations in Counts Five through Forty-Four fail to allege a legal and factual basis for extortion under the Travel Act. The Court's review of the Indictment revealed only one allegation, contained in Paragraph 29, that remotely alleged an attempt to obtain property, and found that it failed to allege extortion as defined in *Scheidler*. Paragraph 29 is not incorporated into the Travel

Act counts; even if it were, this Court has already found it insufficient. Instead, the allegations contained in the Travel Act counts fail to provide a legal or factual basis for extortion. Accordingly, as with Count One, Mr. Fariz respectfully submits that the allegations of extortion must be quashed from the Travel Act counts against him, namely Counts 35-38 and 40-44. Mr. Fariz would also request that the allegations of extortion contained in Counts One, 35-38, and 40-44 be redacted from the Indictment.

One consequence of the removal of the extortion allegations is the amendment of the Indictment. As the Eleventh Circuit has held, "'a fundamental principle stemming from the [fifth] amendment is that a defendant can only be convicted for a crime charged in the indictment.'" *United States v. Cancelliere*, 69 F.3d 1116, 1121 (11th Cir. 1996) (quoting *United States v. Keller*, 916 F.2d 628, 633 (11th Cir. 1990)). To the extent that the deletion of the extortion allegations represent a broadening or constructive amendment of the charges against Mr. Fariz, Counts One, 35-38, and 40-44 should be dismissed. *Id.* The government may have relied heavily on extortion before the grand jury to arrive at the charges in Counts One, 35-38, and 40-44. A review of the grand jury transcripts pertaining to the extortion allegations may therefore be necessary to determine the extent to which the government relied on extortion as a basis for these counts. Mr. Fariz would therefore alternatively request, pursuant to Federal Rules of Criminal Procedure 6(e)(3)(E)(i) and (ii), the disclosure

of the grand jury transcripts pertaining to the extortion allegations, either to defense counsel or to the Court for *in camera* review.[1]

WHEREFORE, Defendant, Hatim Naji Fariz, respectfully requests that this Court (1) quash the allegations of extortion from Counts 35-38 and 40-44, (2) dismiss Counts One, 35-38, and 40-44, or alternatively order the disclosure of the grand jury transcripts as it pertains to the extortion allegations in the Indictment.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

M. Allison Guagliardo
Assistant Federal Public Defender
400 North Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: 813-228-2715
Facsimile: 813-228-2562
Attorney for Defendant Fariz

[1] Mr. Fariz has previously set forth the standards for disclosure of grand jury transcripts, and would incorporate the case law in Docket Nos. 254 and 372.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of June, 2004, a true and correct copy of the foregoing has been furnished by hand delivery to Terry Zitek, Assistant United States Attorney, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602 and to the following by U.S. Mail:

Mr. Bruce G. Howie, Esquire
Piper, Ludin, Howie & Werner, P.A.
5720 Central Avenue
St. Petersburg, Florida 33707

Mr. Stephen N. Bernstein, Esquire
P.O. Box 1642
Gainesville, Florida 32602

Mr. William B. Moffitt, Esquire
Cozen O'Connor
1667 K Street, NW
Suite 500
Washington, D.C. 20006-1605

Ms. Linda Moreno, Esquire
1718 East 7th Avenue, Suite 201
Tampa, Florida 33605

M. Allison Guagliardo
Assistant Federal Public Defender